

# Sink or Swim, or Protection of Ukrainian Agricultural Producers under WTO Rules



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**O**n its thorny path of accession to the WTO, which eventually ended on 16 May 2008, when Ukraine joined the WTO, Ukraine significantly liberalized trade in goods, including agricultural products. According to the *Schedule of Concessions and Commitments annexed to the GATT 1994* (Schedule), Ukraine undertook to reduce the average tariff bindings for agricultural products from 18% to 10.66%. At the same time, the highest import duty rates are permitted for sugar (50%) and sunflower seed oil (30%). It is noteworthy that some bindings involve reductions phased in over a period up till 2013. Notably, the majority of tariff bindings shall be implemented in 2010-2011.

Ukraine also undertook to apply export duties only to a very limited range of products and to substantially reduce previously applicable rates e.g. agricultural products (See Table 1).

Besides, starting from the accession date Ukraine undertook to limit introduction of import or export quotas. In particular, Ukraine committed to establish tariff quota only on cane raw sugar in the volume of 260,000 tonnes annually and to

increase the latter annually by 3,900 tonnes to 267,800 tonnes in 2010.

Moreover, pursuant to the *Report of the Working Party on the Accession of Ukraine to the WTO*<sup>1</sup>, Ukraine refused to seek recourse to the special safeguard provisions of Article 5 of the *Agreement On Agriculture 1994*, allowing countries to apply safeguard measures (i.e. in the form of additional duties) under “simplified” procedure if either (i) the volume of imports exceeds a trigger level or (ii) the price at which imports of a particular product enter the customs territory of such countries falls below a trigger price.

It goes without saying that the said liberalization and financial crisis resulted in a surge of imports of different agricultural products into Ukraine, which may have a negative effect on Ukrainian agricultural producers. As Ukraine waived its right to safeguard procedure under Article 5 the *Agreement On Agriculture 1994*, in this article we would like to focus on the general overview of some WTO consistent measures that may help Ukrainian agricultural producers to legitimately protect the Ukrainian market from imports.

## Trade investigations

First of all, Ukrainian producers should bear in mind the “traditional” trade defence remedies applicable within the WTO, i.e. anti-dumping<sup>2</sup> and countervailing duty investigations<sup>3</sup> (applied to protect Ukrainian producers from unfair competition from foreign producers) as well as safeguard investigations<sup>4</sup> (applied in the event of a surge in imports).

The effectiveness of the said measures is confirmed by the practice of the other WTO members frequently employing them<sup>5</sup> (See Table 2).

As far as Ukraine is concerned, it also employs trade defense remedies i.e. from the beginning of 1999 to May 2010, 25 anti-dumping and 33 safeguard investigations were initiated in Ukraine. As of May 2010 2 anti-dumping and 4 safeguard

<sup>1</sup> WT/ACC/UKR/152, dated 25 January 2008; paragraph 391.

<sup>2</sup> Regulated by Article VI of the GATT 1994; the *Agreement On Implementation of Article VI of the GATT 1994*; the *On Protection of the National Producer against Dumped Imports Act of Ukraine*; the *On Foreign Economic Activity Act of Ukraine* (Articles 9, 31).

<sup>3</sup> Regulated by Article VI of the GATT 1994; the *Agreement On Subsidies and Countervailing Measures*; the *On Protection of the National Producer against Subsidized Imports Act of Ukraine*; the *On Foreign Economic Activity Act of Ukraine* (Articles 9, 31).

<sup>4</sup> Regulated by Article XIX of the GATT 1994; the *Agreement On Safeguards*; the *On Application of Special Measures to Imports into Ukraine Act of Ukraine*; the *On Foreign Economic Activity Act of Ukraine* (Articles 9, 31).

<sup>5</sup> [http://www.wto.org/english/tratop\\_e/tratop\\_e.htm](http://www.wto.org/english/tratop_e/tratop_e.htm)

Table 1

Products	Rate as of the date of accession to the WTO	Final rate	Date, by which the final rate shall be imposed
Oilseeds	16%	10%	2014
Live cattle	50%	10%	2016

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Table 2

Investigations/ measures	Quantity, including related to live animals, animal prod- ucts and vegetable products ("agricultural products")	Period
Anti-dumping investigations	3427, including 101 related to agricultural products	01.01.1995 — 31.12.2008
Anti-dumping measures	2190, including 61 related to agricultural products	
Countervailing duty investigations	226, including 20 related to agricultural products	01.01.1995 — 30.06.2009
Countervailing measures	133, including 12 related to agricultural products	
Safeguard investigations	198, including 31 related to agricultural products	29.03.1995 — 31.12.2009
Safeguard measures	99, including 18 related to agricultural products	

investigations are being conducted and as of March 2010 14 anti-dumping and 4 safeguard measures are effective<sup>6</sup>. As of today no countervailing investigation has been conducted in Ukraine. At the same time, during the said period only one trade investigation against import of agricultural products has been initiated in Ukraine i.e. the anti-dumping investigation related to imports into Ukraine of poultry from the USA and Brazil<sup>7</sup>.

However, in order to ensure the efficiency of such a "protection vehicle" as trade investigations, agricultural producers shall consider that the said procedures are quite complex (especially anti-dumping and countervailing) requiring the involvement of a professional team of lawyers, economists/analysts as well as employees of the agricultural producer. Only effective collaboration between all members of the team ensures submission of all relevant and duly substantiated documents and evidence

<sup>6</sup> [http://www.meg.gov.ua/control/uk/publish/category/main?cat\\_id=34786](http://www.meg.gov.ua/control/uk/publish/category/main?cat_id=34786)

<sup>7</sup> The Notification of the Interdepartmental Committee on International Trade "On initiation and conducting anti-dumping investigation related to import into Ukraine of halves and quarters of chickens, chicken legs and parts thereof originating from the United States of America and the Federative Republic of Brazil" published in the government newspaper "Uryadovyy Kur'yer" of 17 March 2010 No. 47.

to fully protect the interests of agricultural producers.

In addition, in the event of countervailing investigations, agricultural producers should bear in mind that the *Agreement On Agriculture*<sup>8</sup> establishes specific rules of domestic support and subsidies in the field of agricultural products that may be not subject to countervailing duties under the *Agreement On Subsidies and Countervailing Measures 1994*. Similar rules are set out by the *On Protection of National Producer against Subsidized Imports Act of Ukraine*<sup>9</sup>.

### Balance-of-payment restrictions

Article XII, XVIII of the *General Agreement On Tariffs and Trade 1994* (GATT) directly entitles any contracting party to institute import restrictions (e.g. import surcharges) in order to safeguard its balance of payments. Additional requirements to the balance-of-payment restrictions are stipulated by the *Understanding on the Balance of Payment Provisions of GATT 1994*.

As far as Ukrainian legislation is concerned, it allows applying the balance-of-payment restrictions by the

<sup>8</sup> I.e. Parts IV-VII.

<sup>9</sup> I.e. Article 9, Annex 4.

*On Foreign Economic Activity Act of Ukraine*<sup>10</sup>. The detailed procedure was introduced by the *On Amending Some Laws of Ukraine to Improve the Balance of Payments of Ukraine in Connection with the Global Financial Crisis Act of Ukraine* (BOP Act) i.e. the BOP Act authorizes the Parliament of Ukraine to introduce temporary import surcharges in the event of the balance of payments reaching a critical state. The said surcharges shall be introduced for products and at the rates submitted by the Cabinet of Ministers of Ukraine (CMU) for a period of up to 6 months<sup>11</sup>.

Notably, Ukrainian agricultural producers have already used the above measure. The BOP Act introduced as of 6 March 2009 an import surcharge of 13% for a period of 6 months applicable to a wide range of different products, including agricultural products like cattle/pig/poultry meat, apples and pears, sugar, wine etc.

However, application of the balance-of-payment restrictions entails some practical difficulties, to name but a few:

- (i) Necessity to substantiate balance-of-payment "problems";
- (ii) The rate of import surcharge to be imposed is not known in advance;
- (iii) Complexity of implementation i.e. necessity to directly involve Parliament, the CMU and the WTO Committee on Balance of Payments Restrictions;
- (iv) Necessity to apply import surcharge not only to agricultural products, but also to other products so as to avoid risk of declaring thereof as protectionist;
- (v) Parliament is entitled to abolish applicable import surcharges at any time;
- (vi) Any contracting party, whose trade is adversely affected by balance-of-payment re-

<sup>10</sup> I.e. Article 19.

<sup>11</sup> The said term may be extended.

UKRAINE  
WAIVED  
its RIGHT  
to special  
safeguard  
PROCEDURE  
under  
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of the  
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on  
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strictions, may be released from its obligations under *GATT 1994* towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances. Such “countermeasures” will most probably be applied in the field of agricultural products.

### Renegotiation of market access commitments assumed by Ukraine within WTO accession

Notably, in the case of agricultural producers only Ukraine’s individual commit-

ments set out in the Schedule can be renegotiated. For instance, new import tariffs for certain agricultural products may be introduced or currently applicable ones may be increased, quotas for cane raw sugar may be decreased, etc.

The said renegotiation is directly allowed by Article XXVIII *GATT 1994* as well as by the *Understanding on the Interpretation of Article XXVIII of the GATT 1994* and it is applied by WTO members in practice. That is, according to the WTO Secretariat’s records between 1951 and 1994 about 300 negotiations were initiated by 42 members of the *GATT 1947*. Since the establishment of the WTO in 1995, there have been 34 requests to enter into renegotiations under *GATT Article XXVIII*, 4 of which have been withdrawn, 8 have been concluded and formally certified, and 5 have been concluded but for various reasons have not been certified. Although the remaining 17 are in principle still ongoing, it should be noted that 2 of them relate to schedules which were withdrawn in the context of an enlargement of the European Communities (i.e. Hungary and Bulgaria)<sup>12</sup>.

However, the renegotiation procedure is quite complex and sophisticated, in particular:

(i) It shall be initiated on a periodic basis, i.e. each three-year period (the first period beginning on 1 January 1958)<sup>13</sup>. The notification of a contracting party wishing to modify or withdraw any concession embodied in its schedule shall be submitted not earlier than 6 months, nor later than 3 months, prior to the renegotiation period.

That is, Ukraine shall submit the respective request within the period of 1 July to 30 September 2011, while the negotiations shall be wrapped up by 31 December 2011. Any new concessions (if agreed) shall be effective starting from 1 January 2012;

(ii) Renegotiations shall be held and the respective amendments shall be agreed upon with any contracting party, with which the respective concessions were initially negotiated, with any contracting party having a principal supplying interest and any contracting party having a substantial interest in the respective concessions;


(iii) Ukraine shall provide compensatory adjustment with respect to other products in order to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in the *GATT 1994* prior to such negotiations;

(iv) If Ukraine and the interested contracting parties fail to reach an agreement, Ukraine will be free to modify or withdraw the respective concessions. However, other interested contracting parties shall, in their turn, be free to withdraw substantially equivalent concessions (i.e. most probably, in the field of agriculture).


### Moral of the tale

Ukrainian agricultural producers shall eventually realize that the days when the government was able to protect them from imports by substantially increasing import tariffs, introducing quotas etc. have now gone. However, there are still certain effective legitimate protective instruments within the WTO that may be employed by “sinking” agricultural producers.

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<sup>12</sup> [http://www.wto.org/english/tratop\\_e/schedules\\_e/goods\\_schedules\\_table\\_e.htm](http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm)

<sup>13</sup> The *GATT 1994* provides for other opportunities to re-negotiate the market access commitments assumed by WTO members. However, in the case of Ukrainian agricultural producers the said periodic procedure is the most relevant. Hence, in this article we will focus on an overview of the latter